BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEROLD E. TYLER Claimant VS.	)	
	)	Docket No. 166,630
Y.M.C.A. OF THE ROCKIES Respondent AND	)	
NATIONAL UNION FIRE INSURANCE CO. Insurance Carrier AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and insurance carrier request review of the Award of Administrative Law Judge Robert H. Foerschler entered in this proceeding on December 2, 1994. The Appeals Board heard oral argument on March 21, 1995.

APPEARANCES

The respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Bruce D. Mayfield of Overland Park, Kansas. Because claimant had previously settled his claim with the respondent and insurance carrier, no one appeared on his behalf.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

Because the Administrative Law Judge found the respondent did not have knowledge of a pre-existing impairment that constituted a handicap, the Administrative Law Judge held the Workers Compensation Fund had no liability in this proceeding. The respondent and insurance carrier requested this review and contend the evidence establishes the requisite knowledge. In the alternative, the respondent and insurance carrier argue knowledge should be conclusively presumed under K.S.A. 1991 Supp. 44-567, because they contend claimant knowingly misrepresented or concealed facts regarding his pre-existing condition. Fund liability is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

The purpose of the Workers Compensation Fund is to encourage the employment of persons handicapped as a result of physical or mental impairment by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides, in part:

> "'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
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> 15. Loss of or partial loss of the use of any member of the body;
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> 16. Any physical deformity or abnormality;
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> 17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or retaining employment."

In order for the respondent to be relieved of liability, it is the respondent's burden of proof to show it hired or retained a handicapped employee after acquiring knowledge of the pre-existing impairment.

K.S.A. 1991 Supp. 44-567(b) provides, in part:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

Knowledge of a prior injury does not constitute knowledge of a prior handicap. Johnson v. Kansas Neurological Institute, 240 Kan. 123, 727 P.2d 912 (1986); Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). However, the statutes neither require the employer have a knowledge of the specific injury or medical condition, nor the impairment be demonstrably disabling. Likewise, the employer need not have mental reservation. Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), Aff'd 242 Kan. 430, 748 P.2d 420 (1988). The statutes only require knowledge of a pre-existing impairment or handicap. Id at 434-35.

K.S.A. 1991 Supp. 44-567(c) provides that knowledge of the worker's pre-existing impairment or handicap is conclusively presumed if the worker knowingly makes any of the six (6) misrepresentations set forth in that statute, which provides:

> "Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation."

Concealment must be intentional. An employee who misrepresents the conditions of his health to his employer solely by reason of accident or mistake without any awareness that he has done so cannot be said to have knowingly made the misrepresentation contemplated by K.S.A. 1991 Supp. 44-567(c). Krauzer v. Farmland Industries, Inc., 6 Kan. App. 2d 107, 626 P.2d 1223 (1981); Collins v. Cherry Manor Convalescent Center, 7 Kan App. 2d 270, 640 P.2d 875 (1982).

Before beginning work for the respondent, claimant prepared a medical questionnaire in which he noted he had previous cervical and lumbar spinal fusions. However, respondent's human resource director, James Boyd, testified that he did not recall ever reviewing that form, and probably would not have reviewed the form, because historically the document was used strictly by nurses to review when an employee saw

them with an ailment. The mere fact an employer retains a document that contains information of an impairment or handicap does not establish knowledge.

Mr. Boyd also testified that at some point before claimant's accident on May 12, 1992, he became aware claimant had a "bad back." The evidentiary record contains little more regarding the extent of Mr. Boyd's knowledge. On the other hand, claimant testified he did not recall telling others about his prior back and neck surgeries because he was not having physical complaints at the time and there was no other reason to discuss his prior medical treatment. Further, no one asked him about his physical health.

Based upon the above, the Appeals Board finds the respondent has failed to prove it had knowledge of a pre-existing impairment that constituted a handicap before the work-related accident on May 12, 1992, which is the subject matter of this proceeding.

Likewise, the evidentiary record fails to establish that it is more probably true than not that claimant knowingly misrepresented his impairment, previous accidents, or any other information mentioned in K.S.A. 1991 Supp. 44-567(c). The claimant was forthright in preparation of the medical questionnaire form and provided truthful answers on his application form. When the application form asked whether claimant felt he was handicapped in the job for which he applied, the claimant truthfully answered that he did not. Also, claimant did not misrepresent his health to respondent in any other manner. Although he had previous lumbar and cervical surgery in approximately 1976, claimant testified he felt he was neither disabled nor impaired from working for the respondent at the time he prepared the application and questionnaire.

The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge that are not inconsistent with the findings and conclusions set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler entered in this proceeding on December 2, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy G. Lutz, Overland Park, KS
Bruce D. Mayfield, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director